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In the Supreme Court of the United States

October Term, 1970

[redacted]

v.

Federal Trade Commission

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [redacted] CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 509

THE SEEBURG CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a–9a) is reported at 425 F.2d 124. The opinions and final order of the Federal Trade Commission (Pet. App. 15a–42a, 46a) are not yet officially reported.

JURISDICTION

The opinion and judgment of the court of appeals were entered on April 29, 1970 (Pet. App. 1a), and on May 21, 1970 the opinion was modified upon petitioner's petition for rehearing (Pet. App. 10a). The petition for a writ of certiorari was filed on August 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission adequately considered the findings of its hearing examiner when it reversed his determination that the merger of two leading manufacturers of soft drink bottle vending machines did not violate Section 7 of the Clayton Act.

2. Whether the Federal Trade Commission, upon ordering divestiture of a corporation acquired in violation of Section 7, may additionally prohibit any future acquisition of firms engaged in the same line of commerce for a specified period.

STATUTES INVOLVED

Pertinent provisions of the Clayton Act (38 Stat. 730, as amended, 15 U.S.C. 12–27) and the Administrative Procedure Act (60 Stat. 237, as amended, 5 U.S.C. (Supp. V) 551–559, 701–706) are set forth in the petition (Pet. 3–5).

STATEMENT

In 1963 the Seeburg Corporation, the nation's second largest full-line manufacturer of coin-operated vending machines and fourth largest manufacturer of coin-operated bottle vending machines, acquired the Cavalier Corporation (Pet. App. 29a–32a; CX 247,[1] in camera). At the time of the merger, Cavalier manufactured bottle vending equipment which it sold exclusively to independent franchisees or wholly owned bottlers of the Coca-Cola parent syrup company under the latter's vending equipment approval program. Cavalier had been an approved supplier since at least 1934

[1] "CX" refers to the Commission's exhibits before the Com-

(Pet. App. 25a, 74a). Cavalier ranked sixth in th overall vending machine market and third in th bottle vending machines submarket (Pet. App. 29a 32a; CX 247, in camera). Coca-Cola bottlers accounte for slightly more than half of all bottle vendin machine sales in 1963 (Pet. App. 20a).

Seeburg has attained its substantial market posi tion almost entirely through acquisitions (Pet. App 72a; J.A. 91, 660–70, CX 11, pp. 8–9). It entere the bottle vending machine market in 1969 throug the acquisition of the Choice-Vend Corporation, whic largely supplied bottlers other than Coca-Cola—so called "trade" bottlers (Pet. App. 82–83a).

To facilitate Choice-Vend sales to Coca-Cola bottler Seeburg sought approval of its machines from th parent Coca-Cola firm under its equipment approva program, but was repeatedly rejected (Pet. App. 23a 122a–124a). In 1962 Coca-Cola informed Seeburg tha under its criteria for approval, new suppliers would have to offer its bottlers better prices or quality, pro vide equipment not available from present supplier or otherwise save bottlers money on equipment pur chases (Pet. App. 23a–25a, 120a–121a, 122a–124a). Thereafter Seeburg abandoned any further attempt to gain Coca-Cola approval; it acquired Cavalie instead.

In 1966 the Federal Trade Commission issued complaint challenging the merger as a violation o Section 7 of the Clayton Act (Pet. App. 61a). Th

"J.A." refers to the Joint Appendix filed before the low court.

hearing examiner ordered the complaint dismissed (Pet. App. 61a–173a). He found that Seeburg and Cavalier were not in actual or potential competition because Coca-Cola's approval program separated competition for sales to Coca-Cola bottlers from sales to "trade" bottlers. (Pet. App. 149a–153a.) Since Seeburg had never persuaded the parent Coca-Cola company to approve its machines, and had abandoned any efforts to do so, and since Cavalier did not sell to "trade" bottlers, the examiner concluded that neither company was an actual or potential competitor of the other.

The examiner, in addition, found the merger to be beneficial to competition. There is a trend towards full-line vending operations featuring compatible "banks" of diversified vending equipment (Pet. App. 100a–102a, 113a–118a). The demand for these banks comes primarily from large national concerns, such as oil companies, who seek uniform equipment for their various business outlets (Pet. App. 106a–109a). Coca-Cola has been particularly active in this "National User" market. The examiner found that a manufacturer must be able to supply both "trade" and Coca-Cola bottlers with machines to participate fully in this market (Pet. App. 109a–113a). Prior to the merger, only the Vendo Co., the industry's largest firm (Pet. App. 29a), had access to both the

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He also found that Cavalier was "unsuccessful" in a two year attempt to sell to "trade" bottlers (Pet. App. 12a).

Cavalier's need to diversify in order to continue as an effective competitor was cited in partial justification of this merger (Pet. App. 127a–130a, 162a).

trade and Coca-Cola segments of the market. The examiner concluded that the merger of Seeburg and Cavalier was "a natural and legitimate diversification attempt" that would offer Vendo its only meaningful competition (Pet. App. 159a–163a).

On appeal by complaint counsel, the Commission unanimously reversed the examiner's determination (Pet. App. 15a–42a). It held that Seeburg and Cavalier were competitors in a submarket composed of bottle vending machines, whether sold to Coca-Cola or the "trade bottlers" (Pet. App. 22a, 24a). It found that Seeburg faced no "insuperable obstacles in selling to Coca-Cola bottlers or in securing approval from the parent company" (Pet. App. 25a); it noted that in 1963 Seeburg had sold 3 percent of all bottle vending machines purchased by Coca-Cola bottlers that year (Pet. App. 23a). Coca-Cola's approval requirements, it ruled, were simply the kind of demand for better price, innovation or performance upon which any customer insists before taking on a new supplier (Pet. App. 25a); the fact that a small firm, Cornelius, gained Coca-Cola approval for its innovative product in 1963 demonstrated that those conditions could be met (Pet. App. 26a). Seeburg's failure to obtain Coca-Cola's approval was not conclusive on the question of competition since "[u]nsuccessful bidders are no less competitors than the successful one." *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 661 (Pet. App. 24a).

Commissioner Nicholson did not participate because the case was argued before he was appointed (Pet. App. 42a).

The Commission noted that in 1966 Coca-Cola abandoned its approval program for a system of evaluation reports to be made available to all its franchisees. All reputable manufacturers were eligible to submit bottle vending equipment for evaluation. (Pet. App. 26a–27a; 13a, 134a–137a). This demonstrated that there was no "economic imperative" separating the Coca-Cola and trade bottle vending machine markets (Pet. App. 27a). In fact, the equipment supplied to all bottlers, the Commission noted, was identical except with respect to trademark and outside trim (Pet. App. 22a).

Turning to the competitive effects of the merger, the Commission found increasing concentration within both the market for vending machines and the submarket for bottle vending machines.[1] The overall market experienced a rapid decline in the number of manufacturers (Pet. App. 32a); the combined market shares of the top five firms increased from 67.1 percent in 1963—the year of the acquisition—to 73.7 percent in 1965 (Pet. App. 31a). Similarly, in the submarket for bottle machines the top five firms increased their share of sales from 78.3 percent to 84.4 percent over the same period (*ibid.*). The merger made Seeburg, with almost 25 percent, second in the bottle machine market, and enhanced its position in the overall market (Pet. App. 29–32a). The Commission concluded that the merger created a sufficient

[1] It also noted that the concentration figures it found would not be substantially different if can vending machines were considered together with bottle vending machines (Pet. App. 32a, fn. 12).

threat to competition to bring it within the prohibitions of Section 7 of the Clayton Act (Pet. App. 27a–36a).

It rejected the hearing examiner's findings that the merger was beneficial to competition because it would provide a stronger competitor for Vendo Co. (Pet. App. 36a–39a). The Commission found that both Seeburg and Cavalier could independently compete against Vendo and that approval of their merger might "endanger a much broader anticompetitive effect by triggering other mergers by companies seeking the same competitive advantages sought by [the acquiring firm] in this case." *United States* v. *Continental Can Co.*, 378 U.S. 441, 464, (Pet. App. 39a).

The Commission dealt with the question of relief in a separate opinion after further briefing and argument. It rejected Seeburg's suggestion that the case be withdrawn from adjudication and settled by a consent order allowing Seeburg to retain Cavalier, barring it from further acquisitions for ten years and requiring it to grant nonexclusive, non-discriminatory licenses on Cavalier's patents. The Commission ordered complete divestiture. It also prohibited Seeburg from acquiring, for ten years "of corporations engaged in the manufacture and or sale of vending machines in the United States" without prior Commission approval (Pet. App. 43a–60a). Two Commissioners dissented on the ground that changed conditions in the industry made preferable acceptance of the proposed consent order.

The court of appeals unanimously sustained the Commission's order, but limited the prohibition against

further acquisitions to firms engaged in manufacture of bottle vending machines.

ARGUMENT

Petitioner does not directly challenge the Commission's decision that the merger of Seeburg and Cavalier violated Section 7 of the Clayton Act on the merits. It contends only that the Commission did not adequately consider the findings of the hearing examiner in reaching that decision and that the agency lacks power to prohibit certain future acquisitions as part of the remedy for the violation. The court below applied appropriate standards of judicial review to the Commission decision and decided the issues raised correctly. Its decision is not in conflict with other circuits. There is no reason for further review.

1. In reversing its hearing examiner, the Commission relied upon basic facts on which there was no fundamental disagreement (Pet. App. 15a). Its conclusion as to the legal significance of those facts and the standards of Section 7, however, differed from the examiner's. As a result of his erroneous view of the law, the examiner's ultimate conclusions as to the definition of the relevant market, and the actual and potential competition between the merging firms, were wrong. Given these errors, the Commission had both the power and the duty to correct them. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474; *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358.

Cinderella Career & Finishing Schools, Inc. v. *Federal Trade Commission*, 425 F. 2d 583 (C.A.D.C.),

upon which petitioner relies, is inapposite. The court of appeals there held that the Commission could not disregard extensive relevant testimony and the hearing examiner's findings that advertisements were not misleading and make a *de novo* determination that they were, particularly where the advertisements did not on their face disclose their capacity to deceive. 425 F. 2d at 585–588. By contrast here, the Commission gave an extensive, detailed and careful explanation of its reasons for reversing the hearing examiner's key findings concerning definition of the relevant markets, competition within them and the asserted procompetitive effect of the merger (Pet. App. 15a–42a). The large number of specific findings vacated by the Commission were either related to these basic conclusions or concerned post-acquisition evidence (*e.g.*, that the merged firms market share declined slightly) which the Commission deemed irrelevant (Pet. App. 40a). Cf. *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, 599–601.

The opinion of the Commission was based on substantial evidence in the record. Its rejection of the examiner's conclusion that bottle vending machines sold to Coca-Cola composed a different submarket from machines sold to other bottlers is supported by the history of Seeburg's efforts to sell the same products to all of these bottlers. *See United States* v. *El Paso Nat. Gas Co.*, 376 U.S. 651, 661. Its conclusions as to the anti-competitive effects of the merger in a properly defined market are sustained by the industry positions of the two firms. See, *e.g.*, *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 592 (concurring opin-

ion); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363; *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280. Its findings that the merger was not necessary to provide full-line competition for the industry leader is based on evidence that the merger did not broaden Seeburg's product line (Pet. App. 37a) and was not necessary for Cavalier to offer competition even with its limited line (Pet. App. 38–39a), cf. *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, and on the high risk that further mergers might be triggered by acceptance of such a justification. Cf. *United States* v. *Continental Can Co.*, 378 U.S. 441, 463–464.

The other cases petitioner cites do not support its contention that the lower courts are in conflict over the weight to be given by an agency to its examiner's findings. All those decisions recognize that the Commission may reverse or alter the findings of the hearing examiner so long as there is substantial evidence in the record as a whole to support this action, particularly where the factual issues do not turn upon the credibility of witnesses. Were the rule otherwise the statutory responsibility of administrative agencies to develop policy and give content to the broad terms of the statutes they administer would be restricted.

Both *Advertising Specialty National Association* v. *Federal Trade Commission*, 238 F. 2d 108, 113 n. 2 (C.A. 1), and *Maggio* v. *Federal Trade Commission*, 293 F. 2d 774, 776 (C.A. 9), recognize that a hearing examiner's findings not based upon the credibility of witnesses cannot be regarded as controlling. In *Soap-On Tools Corp.* v. *Federal Trade Commission*, 321 F. 2d 825 (C.A. 7), the Commission was reversed on one finding

2. Petitioner also contends that the Federal Trade Commission has only the power to order divestiture of a firm acquired in violation of Section 7 of the Clayton Act and not the additional power to prohibit any future acquisition of firms engaged in the same line of commerce for a specified period.[*] The identical issue is presented in the petition for a writ of certiorari now pending in *Abex Corporation* v. *Federal Trade Commission*, No. 146, O.T. 1970. The reasons set forth in the government's brief in opposition in

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because the question turned largely on credibility (321 F. 2d at 835) and others because the reviewing court found no evidence to support the findings of the Commission which rejected the examiner's. *Id.* at 833, 835, and 837. In *Burke Golf Equipment Corp.* v. *National Labor Relations Board*, 284 F. 2d 943 (C.A. 6), the court merely observed that a disagreement between a hearing examiner and the Board requires a more careful review of the record, and held that the Board's findings were not supported by substantial evidence. *Burke Golf Equipment Corp.*, *supra*, at 944. In *Minneapolis-Honeywell Reg. Co.* v. *Federal Trade Commission*, 191 F. 2d 786, 789-790 (C.A. 7), certiorari dismissed, 344 U.S. 206, the court followed the admonition of *Universal Camera* that the evidence must be assessed in light of the examiner's opportunity to observe witnesses and concluded, that the preponderance of the evidence supported the examiner. In *Art National Manufacturers Distributing Co.* v. *Federal Trade Commission*, 298 F. 2d 176 (C.A. 2), and *Goodman* v. *Federal Trade Commission*, 244 F. 2d 584 (C.A. 9), the courts correctly recognized that *Universal Camera* does not require the Commission to follow the examiner's findings, but only seeks to place such findings in their proper perspective in the court's review of the entire record.

[*] Petitioner proposed to accept a ten-year ban on further acquisitions of firms engaged in the manufacture or sale of soft drink vending equipment provided it could retain Cavalier (Pet. App. 49a).

that case[9] refute petitioner's contentions here and the Court is respectfully referred to them.[10]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1970.

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[9] Copies of the government's brief in opposition in *Abex* have been served upon counsel for petitioner herein.

[10] Statements in the brief for the United States in Opposition to Motions to Affirm in *United States* v. *duPont & Co.*, No. 55, O.T. 1960, p. 4, which appear to be contrary to the government's position as stated in the *Abex* case, do not represent the government's current view of the Commission's remedial powers.